

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

:SINGLE BENCH:

{HON'BLE SHRI JUSTICE ANAND PATHAK}

MISCELLANEOUS CRIMINAL CASE NO.5621/2020

Balveer Singh Bundela

Vs.

State of Madhya Pradesh

Shri Ankur Maheshwari, learned counsel for the applicant.

Shri R.S. Bansal, learned PP for the respondent/State.

Shri Awdhesh Singh Tomar and Ms. Sangeeta Pachori, learned counsel for the complainant.

Shri V.K. Saxena, learned senior counsel with Shri Rajesh Kumar Shukla, Shri Atul Gupta and Shri S.K. Shrivastava as well as Shri V.D. Sharma, learned counsel as amicus curiae.

Whether approved for reporting : Yes

Law laid down:

1- Anticipatory bail application is maintainable even after filing of charge-sheet, till the person is arrested as per the mandate of Apex Court in the cases of **Gurbaksh Singh Sibbia etc. Vs. The State of Punjab, AIR 1980 SC 1632, Sushila Aggarwal and others Vs. State (NCT of Delhi) and another in SLP (Criminal) Nos.7281-7282/2017 passed on 29-01-2020, Bharat Chaudhary and another Vs. State of Bihar and another, (2003) 8 SCC 77 and Ravindra Saxena Vs. State of Rajasthan, (2010) 1 SCC 684.**

2- So far as maintainability of anticipatory bail is concerned, it is maintainable even the person is declared absconder under

Section 82 of Cr.P.C. but on merits case would be governed by the judgment of Apex Court rendered in the case of **Lavesh Vs. State (NCT Of Delhi), (2012) 8 SCC 73.**

3- Section 82/83 Cr.P.C. is transient provision subject to finality of proceedings as provided under Sections, 84, 85 and 86 of Cr.P.C.

ORDER
{Delivered on 12th day of May, 2020}

1. This is first bail application preferred by the applicant under Section 438 of Cr.P.C. wherein he is apprehending his arrest in a case registered vide Crime No.448/2019 at Police Station Vishwavidyalaya, District Gwalior for alleged offence punishable under Sections 376, 386, 506 of IPC.
2. It is submitted by learned counsel appearing for the applicant that police has registered a false case against him. As per FIR, date of incident appears to be 27-10-2019 whereas FIR lodged on 15-12-2019, apparently delayed in nature. Applicant and prosecutrix entered into wedlock through Hindu rites and rituals and copy of marriage certificate and photographs in this regard are attached with the application.
3. As per allegations on the pretext of marriage, alleged rape has been committed by applicant. Some amount has been transferred in favour of the prosecutrix by the applicant which reveals that both were in relationship. Even otherwise, on the pretext of

marriage if physical intimacy developed then the same does not constitute offence of rape. In support of his submission, he relied upon the judgments of Apex Court in the case of **Pramod Suryabhan Pawar Vs. State of Maharashtra and others, AIR 2019 SC 4010** and **Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others, AIR 2019 SC 327.**

4. It is further submitted that after registration of offence both tried to settle the matter and therefore, petition has been preferred under Section 482 of Cr.P.C. for compromise bearing M.Cr.C.No. 930/2020 which was dismissed as withdrawn on 28-01-2020 because the allegations were of Section 376 of IPC also (in light of various judgments of Apex Court), therefore, compromise could not be given effect to. This itself indicates that domestic nature of relationship and incompatibility into it has been tried to be converted into offence of rape. Applicant is aged 41 years of age and prosecutrix is around 41-42 years of age. Therefore, at such matured stage, if two adults enter into wedlock and thereafter their domestic relationship is severed for any reason then the same does not amount to commission of offence of rape. He is reputed citizen of locality and chance of absconson is remote. Confinement would bring social disrepute and personal inconvenience. He undertakes to cooperate in investigation and would make himself available as and when required by the investigating officer and also

undertakes that he would not be source of harassment and embarrassment to the complainant party in any manner. Consequently, he prayed for bail of anticipatory nature.

5. Learned counsel for the applicant further responded to the queries raised by this Court about maintainability of the application for anticipatory bail under Section 438 of Cr.P.C. in view of the legal position that when any person has been declared as absconder and award of Rs.5,000/- has been declared by the Superintendent of Police as per Police Regulation 789 (as per case diary of instant case) then his prospects to get anticipatory bail gets extinguished, learned counsel for the applicant submits that it is not correct application of law because here in the present case the applicant has not been declared absconder so far as per Sections 82 and 83 of Cr.P.C. Therefore, legal bar created by the judgments of Apex Court in the matter of **Lavesh Vs. State (NCT Of Delhi), (2012) 8 SCC 73** as well as in the matter of **State of M.P. Vs. Pradeep Sharma, (2014) 2 SCC 171** is not applicable in the present set of facts.

6. It is submitted by learned counsel for the applicant that police is at liberty to declare award over any person for apprehension who is not available for investigation but this may be their device to deny the applicant (or other similarly situated persons) a chance to get anticipatory bail.

7. On the other hand, learned PP for the respondent/State opposed the prayer and on the basis of case diary submits that the applicant is required for investigation. Rs.5,000/- as award has been declared by the Superintendent of Police, Gwalior over his arrest vide proclamation dated 30-01-2020 as per M.P. Police Regulations, para 80 and the fact that several Farari Panchnamas (arrest memos) are being prepared against him for ensuring his appearance but he did not submit, therefore, he is absconding and therefore his bail application be dismissed accordingly. He relied upon the judgment of Hon'ble Apex Court in the matter of Lavesh (supra) and Pradeep Sharma (supra).
8. Learned counsel for the complainant also matched the vehemence of counsel for the State and submitted that the applicant developed physical intimacy with the prosecutrix under the pretext of solemnization of marriage and on the promise of giving land and flat to the prosecutrix. On 16-11-2019 he solemnized marriage with the prosecutrix without giving divorce to his first wife and committed rape on 11-12-2019. Previously also he committed rape over her on 26/27-10-2019. He is a proclaimed offender under Section 82 of Cr.P.C. therefore, as per the judgments of Lavesh (supra) and Pradeep Sharma (supra), he cannot be given the benefit of grant of anticipatory bail. Learned counsel for the complainant also

raised the question of maintainability of the application under Section 438 of Cr.P.C. in view of the above referred judgments.

According to learned counsel, once a person is declared as absconder by way of cash award then application under Section 438 of Cr.P.C. is not maintainable. Since the applicant also extended threat to the complainant, therefore, on this count also bail application be dismissed.

9. This Court requested Shri V.K. Saxena, learned senior counsel and Shri V.D. Sharma counsel to assist the Court as amicus curiae and resultantly they addressed this Court on following questions raised in this case:
 - i- Whether after being declared as an absconder under Section 82/83 of Cr.P.C. or by police through Farari Panchnama or through declaration of cash award for apprehension of accused, his application under Section 438 of Cr.P.C. seeking anticipatory bail before High Court or Sessions Court is maintainable or not ?
 - ii- Whether application for anticipatory bail is barred even after filing of charge-sheet ?
10. Shri Saxena, learned senior counsel was ably assisted by Shri Rajesh Kumar Shukla, Shri Atul Gupta and Shri S.K. Shrivastava, Advocates.
11. Learned senior counsel referred the judgment of Constitution Bench of Apex Court in the case of **Gurbaksh Singh Sibia**

etc. Vs. The State of Punjab, AIR 1980 SC 1632 and submitted that the concept of anticipatory bail has been elaborately discussed by the Hon'ble Apex Court as incorporated in Cr.P.C. by virtue of 41st report of Law Commission. It is still holding the field, as reiterated by the Constitution Bench of Apex Court in its recent pronouncement in the case of **Sushila Aggarwal and others Vs. State (NCT of Delhi) and another in SLP (Criminal) Nos.7281-7282/2017 passed on 29-01-2020.**

12. He submits that different facets of Section 438 of Cr.P.C. have been elaborately dealt with in these judgments and therefore, law is well settled that personal liberty is such sacrosanct that it cannot be sacrificed at the whims and fancies of Investigating Officer. He referred the solemn duty and its constant violation by the Investigating Officer and other officers to curtail the prospects of personal freedom of person by declaring him absconder by issuing cash reward or preparing Farari Panchnama.
13. According to him, such instances render the affected person at the mercy of Police Officer and his personal freedom is compromised. Therefore, personal liberty cannot be curtailed and in support of his submission he referred various judgments to bring home the fact that personal liberty of an individual by way of seeking anticipatory bail can be considered even after

filings of charge-sheet.

14. Shri V.D. Sharma, learned amicus curiae also placed his submission while taking history of Section 438 of Cr.P.C. by referring Law Commission of India report 41st of year 1969 which categorically recommended for insertion of provision of anticipatory bail in the old Cr.P.C. of 1898 (earlier provision Section 497-A) and by virtue of same, Section 438 of Cr.P.C. of 1973 is offspring of said report. He referred Law Commission of India report No.203 of the year 2005 and Law Commission of India report No.268 of the year 2017 which deal with the developments, difficulties and proposed amendments in respect of anticipatory bail. He referred definition of 'Absconder' and relied upon the judgments in support of his submissions rendered by Apex Court in the matter of **Sunil Clifford Daniel Vs. State of Punjab, (2012) 11 SCC 205, Sujit Biswas Vs. State of Assam, 2013 Cr.L.J. 3140** and the judgment rendered by Madras High Court in the matter of **KTMS Abdul Kader Vs. Union of India, 1977 Cri.L.J. 1708**. Through various judgments relied upon, he tried to bring home the fact that mere absconcence is not sufficient to deny the valuable right of personal freedom of an individual. This is to be seen in the facts and circumstances of each case and he also relied upon the judgment of Apex Court in the matter of **Gurbaksh Singh Sibia etc. (supra)** and **Siddharam Satlingappa Mhetre Vs. Siddharam Satlingappa Mhetre**.

State of Maharashtra, AIR 2011 SC 312 to submit that anticipatory bail is maintainable at any stage till accused is not arrested but with the only caveat/condition that each case bears different factual matrix, therefore, merit of the case has to be dealt with accordingly.

15. Heard learned counsel for the parties as well as learned Amicus Curiae at length and perused the case diary.
16. Here, the factual contours of case indicates that the applicant and prosecutrix are in their forties (aged 41-42 years) and as per the allegations, the applicant was already married and interestingly on the false promise of marriage, he committed rape and as per contents of FIR itself, he solemnized marriage with the prosecutrix on 16-11-2019 and thereafter continued to live as her husband for some time. As per submission of learned counsel for the applicant, the application under Section 482 of Cr.P.C. for compromise by way of M.Cr.C.No.930/2020 was also filed earlier by the parties to settle their dispute but since the allegation was under Section 376 of IPC also, therefore, the said prayer for settlement was rejected by this Court.
17. Here, the main objection of counsel for the respondent/State and complainant is preparation of Farari Panchnama and declaration of award of Rs.5,000/- over the applicant to secure his arrest and therefore, the respondent/State and complainant

sought dismissal of this application on this ground mainly.

18. Constitution Bench judgment of Apex Court in the matter of **Gurbaksh Singh Sibia etc. (supra)** takes all possible contours into its ambit. Full Bench judgment of Punjab & Haryana High Court from which case originates, rejected the application for bail after summarizing eight legal propositions and all those legal propositions were considered and repelled by the Constitution Bench in very categorical terms. Some of the paras of the judgment are worth reproduction in the present case also; to consider the importance given by the Apex Court to the Personal Liberty of an individual:

“15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, this Court cuts down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if this Court were to frame a 'Code for the grant of anticipatory bail', which

really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the Court, by providing that it may grant bail "if it thinks fit". The concern of the Courts generally is to preserve their discretion without meaning to abuse it. It will be strange if the Court exhibits concern to stultify the discretion conferred upon the Courts by law.

21. *-----A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.*

26. *We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail*

amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein.”

19. Similarly, the Apex Court in the case of **Bharat Chaudhary and another Vs. State of Bihar and another, (2003) 8 SCC 77**

has held in categorical terms that even after taking cognizance of complaint by the trial Court or after filing of charge-sheet by the Investigating Agency, a person can move an application for anticipatory bail and Section 438 of Cr.P.C. nowhere prohibits the Court concerned from grant of anticipatory bail in appropriate case. Relevant extract is reproduced as under:

“7. From the perusal of this part of Section 438 of the Crl. P.C., we find no restriction in regard to exercise of this power in a suitable case either by the Court of Sessions, High Court or this Court even when cognizance is taken or charge sheet is filed. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the concerned courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the concerned courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail. In our opinion, the courts i.e. the Court of Sessions, High Court or this Court has the necessary power vested in them

to grant anticipatory bail in non-bailable offences under Section 438 of the Crl. P.C. even when cognizance is taken or charge sheet is filed provided the facts of the case require the Court to do so.”

20. Later on in 2010, the Apex Court in the case of **Ravindra Saxena Vs. State of Rajasthan, (2010) 1 SCC 684** in categorical terms held that anticipatory bail can be granted at any time so long as the applicant has not been arrested, meaning thereby maintainability of an application under Section 438 of Cr.P.C. does not lie at the mercy of any Investigating Agency/Officer or any other consideration including provisions of Cr.P.C. as tried to be projected by the respondent. Relevant extract for ready reference is reproduced as under:

“We may notice here that the provision with regard to the grant of anticipatory bail was introduced on the recommendations of the Law Commission of India in his 41st Report dated 24.09.1969. The recommendations were considered by this Court in a Constitution Bench decision in the case of [Gurbaksh Singh Sibia and others vs. State of Punjab](#). Upon consideration of the entire issue this Court laid down certain salutary principles to be followed in exercise of the power under [Section 438Cr.P.C.](#) by the Sessions Court and the High Court. It is clearly held that the anticipatory bail can be granted at any time so long as the applicant has not been arrested. When the application is made

to the High Court or Court of Sessions it must apply its own mind on the question and decide when the case is made out for granting such relief.”

21. Recently, the Constitution Bench of Hon'ble Apex Court in the matter of **Sushila Aggarwal and others (supra)** has considered the question in respect of Section 438 of Cr.P.C. and question centered around to the extent of period of protection granted to a person under Section 438 of Cr.P.C. and life of anticipatory bail. Questions were as follows:

“(1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.”

22. Although questions were having mixed trappings *vis a vis* present set of facts but reason and conclusion drawn by the Constitution Bench appears to be of great over this Court, relevant extract are reproduced as under:

“47. At this stage, it would be essential to clear the air on the observations made in some of the later cases about whether Section 438 is an essential element of Article 21. Some judgments, notably Ram Kishna Balothia & Anr. (supra) and Jai Prakash Singh v State of Bihar held that the

provision for anticipatory bail is not an essential ingredient of Article 21, particularly in the context of imposition of limitations on the discretion of the courts while granting anticipatory bail, either limiting the relief in point of time, or some other restriction in respect of the nature of the offence, or the happening of an event. We are afraid, such observations are contrary to the broad terms of the power declared by the Constitution Bench of this court in Sibia (supra). The larger bench had specifically held that an “over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions”.”

23. Constitution Bench took note of 203rd report of Law Commission along with other previous reports and considered the judgment rendered by Apex Court in the case of **Salauddin Abdulsamad Shaikh v. State of Maharashtra , (1996) 1 SCC 667 and Adri Dharam Das Vs. State of West Bengal, (2005) 4 SCC 303** and thereafter overruled those judgments which lay

down restrictive conditions or terms limiting grant of anticipatory bail to the period of time.

24. From the discussion of judgments of Constitution Bench in the case of **Gurbaksh Singh Sibia etc. and Sushila Aggarwal (supra)** as well as judgment of Apex Court in the case of

Bharat Chaudhary and Ravindra Saxena (supra), it is apparently clear that no bar can exist against a person seeking anticipatory bail. In other words application under Section 438 of Cr.P.C. is maintainable even after filing of charge-sheet or till the person is not arrested.

25. It is to be kept in mind that Personal Liberty of an individual as ensured by Section 438 of Cr.P.C. is embodiment of Article 21 of Constitution of India in Cr.P.C. Therefore, scope and legislative intent of Section 438 of Cr.P.C. is to be seen from that vantage point.

26. So far as submission of parties regarding judgments rendered by the Apex Court in the case of Lavesh (supra) and Pradeep Sharma (supra) is concerned, reconciliation of Justiciability and Justifiability is to be reached. Close scrutiny of judgment of Apex Court in the case of Lavesh (supra) nowhere bars maintainability of an application under Section 438 of Cr.P.C. if a person is absconding. In fact it takes care of Justifiability (or merit of the case) of any application under Section 438 of Cr.P.C. as per factors provided in Section 438 of Cr.P.C. itself. For ready reference Section 438 of Cr.P.C. is reproduced as under:

“438. Direction for grant of bail to person apprehending arrest.

(1) Where any person has reason to believe that he may be arrested on accusation of having

committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely—

- i- the nature and gravity of the accusation;*
- ii- the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*
- iii- the possibility of the applicant to flee from justice; and.*
- iv- where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail;*

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-Section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under Sub-Section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public

Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court,

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under subsection (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under Sub-Section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a

police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-Section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code."

27. In addition to above referred provision, relevant para of judgment passed in **Lavesh (supra)** is reproduced for ready reference:

"From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled the relief of anticipatory bail."

28. The word 'Entitled' used in the above referred para of Lavesh (*supra*) itself suggests that it talks mainly about entitlement on merits and not about maintainability. Perusal of Section 438 of Cr.P.C. makes it very clear that four factors as enumerated into Section 438(1) of Cr.P.C. contemplates four different exigencies in which **factor (iii)** refers the "possibility of the applicant to flee from justice" and consequence to this factor is 'Abclosion of person' or 'his Concealment' from Investigating Agency.

29. In other words if chance of fleeing from justice exists then application under Section 438 of Cr.P.C. can be rejected and when a person is declared as proclaimed offender as per Section 82 of Cr.P.C. it means that factor (iii) of Section 438 (1) of Cr.P.C. manifested in reality or in other words possibility of applicant to flee from justice converted into reality. To put it differently, Section 82 of Cr.P.C. is manifestation of "Apprehension" as contained in Section 438 (1) factor (iii) of Cr.P.C. The judgments pronounced by the Apex Court in the case of **Lavesh and Pradeep Sharma (*supra*)** nowhere bar the maintainability of the application under Section 438 of Cr.P.C. in wake of person being declared as absconder under Sections 82 and 83 of Cr.P.C. and understandably so because this would not have been in consonance with letter and spirit of Constitution Bench judgment of Apex Court pronounced in the

case of **Gurbaksh Singh Sibia etc. (supra)** and **Sushila Aggarwal and others (supra)** as well as two Judge Bench of Apex Court in the case of **Bharat Chaudhary and another (supra)** as well as **Ravindra Saxena (supra)** because these judgments categorically held that anticipatory bail is maintainable even after filing of charge-sheet and till the person is not arrested.

30. Full Bench decision of this Court in the case of **Jabalpur Bus Operators Association Vs. State of Madhya Pradesh and others, 2003 (1) MPLJ 513** has dealt with law of precedent and rule of stare decisis. One can suitably take guidance from the said Full Court decision of this Court which is based upon several judgments rendered by the Apex Court from time to time in this regard. This Court can profitably rely upon the ratio of the said judgment as delineated in penultimate para.

31- Therefore, Apex Court in the case of **Lavesh and Pradeep Sharma (supra)** impliedly referred the factor (iii) of Section 438 (1) of Cr.P.C. and its different fallouts because according to Apex Court, a person who is proclaimed offender under Sections 82 and 83 of Cr.P.C. loses the sheen on merits to seek anticipatory bail. His application deserves dismissal on merits if he is declared as absconder under Section 82 of Cr.P.C. but application is certainly maintainable. Even otherwise, because the proceedings under Sections 82 and 83 of Cr.P.C. are

transient/interim/provisional in nature and subject to proceedings under Section 84 (at the instance of any person other than proclaimed offender having interest in the attach property), Section 85 (at the instance of proclaimed offender himself) and Section 86 [Appeal against the order (under Section 85 rejecting application for restoration of attach property)]. Even Section 84 (4) of Cr.P.C. gives power to the objector to institute a suit to establish the right which he claims in respect of property in dispute. Therefore, all these provisions render the proceedings under Section 82/83 of Cr.P.C. transient or intermediary and on the basis of transient provision, valuable right of personal liberty of an individual at least to seek anticipatory bail cannot be curtailed. Therefore, on this count also, application under Section 438 of Cr.P.C. is maintainable even if a person has been declared as proclaimed offender in terms of Section 82 of Cr.P.C.

32. Therefore, submission of learned counsel for the complainant lacks merits so far as maintainability of application under Section 438 of Cr.P.C. qua Section 82 of Cr.P.C. is concerned. Even otherwise in the present case, proceedings under Section 82 of Cr.P.C. are not given effect to yet (as per case-diary) and only cash award of Rs.5,000/- by Superintendent of Police has been declared. Said factor can certainly be an important consideration while deciding anticipatory bail application but

not having overriding effect to create a bar for filing anticipatory bail application.

33. Therefore, in the considered opinion of this Court, even if the police authority has declared award or prepared Farari Panchnama even then anticipatory bail application is maintainable, however, it is to be seen on merits that whether that application deserves to be considered and allowed as per the factors enumerated in Section 438 of Cr.P.C. itself and if any of those factors are not satisfied then the Court certainly has discretion to reject it. The said discretion has been given by Constitutional Bench decision of Hon'ble Apex Court in the case of **Gurbaksh Singh Sibia etc. (supra)**.

34. So far as present set of facts are concerned from the case diary and submissions, it appears that on false promise of marriage, initially physical intimacy developed and later on both entered into wedlock but it is grievance of prosecutrix that he is already a married person. Certain bank transactions have already been referred and documented which indicate that they were in proximity. As submitted, both the parties earlier tried to settle the matter by filing petition under Section 482 of Cr.P.C. bearing No.930/2020. Therefore, both matured individuals waited the consequences of their decisions and both lived some days together comfortably. Cumulatively, it appears that the principle enumerated by the Apex Court in the matter of

Pramod Suryabhan Pawar (supra) and Dr. Dhruvaram

Murlidhar Sonar (supra) as well as facts and circumstances of the case, applicant deserves consideration for anticipatory bail.

Even otherwise the police nowhere referred criminal antecedents of the applicant and his presence can be ensured by marking his attendance before the Investigating Officer for investigation purpose.

35. Consensual proximity of Body and Soul cannot be used as a weapon to wreak vengeance at a later point of time when Body and Soul drift apart.

36. Considering the submissions of learned counsel for the applicant as well as fact situation of the case, without expressing any opinion on the merits of the case, I intend to allow this bail application. It is directed that applicant shall be released on bail in case of his arrest on his furnishing personal bond in the sum of **Rs.1,00,000/- (Rs. One Lac Only)** to the satisfaction of Arresting Authority/Investigating Officer and **he shall download the Arogya Setu App.** Bail bond shall be furnished within one and half month as and when situation moves out of Lock-down.

This order will remain operative subject to compliance of the following conditions by the applicant:-

1. The applicant will comply with all the terms and conditions of the bond executed by him;
2. The applicant will cooperate in the investigation/trial, as the

case may be;

3. The applicant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to the Police Officer, as the case may be.
4. The applicant will not commit an offence similar to the offence of which he is accused;
5. The applicant will not seek unnecessary adjournments during the trial; and
6. The applicant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be.
7. **Applicant would not be source of harassment and embarrassment to the prosecutrix or her family members and would not move in her vicinity in any manner.**

37. Before parting, the assistance provided by Shri V.K. Saxena, Senior Advocate, ably assisted by Shri Rajesh Kumar Shukla, Shri Atul Gupta and Shri S.K. Shrivastava as well as Shri V.D. Sharma Advocate as Amicus Curiae deserves appreciation and acknowledgment.

A copy (E-copy) of this order be sent to the trial Court concerned for compliance.

Certified copy/E-copy as per rules.

(Anand Pathak)
Judge

Anil*